Supreme Court, U.S.
FILED
SEP 11 1992
OFFICE OF THE CLERK

92-443

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

James M. Elfelt, Joseph P. Elfelt
Anthony J. Elfelt, Lawrence W. Elfelt,
Paul G. Elfelt, David C. Elfelt
and Steven M. Elfelt,

Petitioners

v.

Albina Cooper, Respondent

on Writ of Certiorari to the Supreme Court for
the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

Richard R. Kobriger, Jr.
Attorney for Petitioners
Cramer, Multhauf & Hammes
1601 East Racine Avenue
P.O. Box 558
Waukesha, WI 53186
Phone: (414) 542-4278

To the Honorable William H. Renquist, the Chief Justice, and the Associate Justices of the Supreme Court of the United States.

James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt and Steven M. Elfelt, the Petitioners herein, pray that a writ of certiorari issue to review the decision of the Supreme Court of the State of Wisconsin entered in the above-entitled case on June 17, 1992.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Wisconsin Supreme Court have the jurisdictional authority to set aside a Quit Claim Deed of the District Director of the Internal Revenue Service issued pursuant to Sections 6331-6339 of the Internal Revenue Code by holding that the Internal Revenue Service did not have authority to sell a delinquent taxpayer's undivided one-half interest in homestead property held in joint tenancy with his spouse?

2. If the Wisconsin Supreme Court had such jurisdictional authority, do Sections 6331-6339 of the Internal Revenue Code give the Internal Revenue Service the authority to sell a delinquent taxpayer's undivided one-half interest in homestead property held in joint tenancy with his spouse?

PARTIES

The plaintiffs below and the petitioners herein are James M. Elfelt, Joseph P. Elfelt Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt and Steven M. Elfelt.

The defendant below and the respondent herein is Albina Cooper. Dale T. Cooper was also a defendant, but died prior to trial. He was not a party to the proceedings before the Supreme Court for the State of Wisconsin.

Neither the United States nor the Internal Revenue Service are a party. However, since both the

respondent and the Wisconsin Supreme Court have questioned the constitutionality of 26 U.S.C. § 6331, 28 U.S.C. § 2403(a) may be applicable.

TABLE OF CONTENTS PAGE

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 1

I. Constitutional Provisions 1

II. Federal Statutes 2

III. Regulations of the Commissioner of the Internal Revenue Service 4

IV. Wisconsin Statutes 4

STATEMENT OF THE CASE 5

ARGUMENT 17

I. THE WISCONSIN SUPREME COURT EXCEEDED ITS AUTHORITY IN HOLDING THAT THE IRS HAD NO AUTHORITY TO SELL MR. COOPER'S UNDIVIDED ONE-HALF INTEREST BY ADMINISTRATIVE LEVY. 17

II. THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH THE INTERNAL REVENUE CODE AND RELEVANT FEDERAL COURT DECISIONS. 21

A. *The Internal Revenue Service was granted the authority to sell Mr. Cooper's interest in the property by the Internal Revenue Code.* 21

B. *The Wisconsin Supreme Court's decision conflicts with the Eighth Circuit Court of Appeals decision in Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974).* 28

C. *The Wisconsin Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court. Further, the Wisconsin Supreme Court has decided the federal question in a way that conflicts with the applicable decisions of this Court.* 30

III. **THE ADMINISTRATIVE LEVY PROCEDURES, AS APPLIED, ARE CONSTITUTIONAL.** 38

CONCLUSION 41

APPENDIX 42

TABLE OF AUTHORITIES

CASES	PAGE
Blacklock v. United States, 208 U.S. 75 (1908)	26
Bull v. United States, 295 U.S. 247 (1935)	22
Ginter v. Southern, 611 F.2d 1226 (8th Cir. 1979), cert. denied, 446 U.S. 967 (1980)	38
Hancock v. Train, 426 U.S. 167 (1976)	19
Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974)	28, 29 30, 39
Hines v. Davidowitz, 312 U.S. 52 (1940)	20
Mayo v. United States, 319 U.S. 441 (1943)	18
Middleton TP. v. N/E Reg. Off., U.S. Postal Serv., 601 F.Supp. 125 (N.J. 1985)	18
Monday v. Milwaukee County Expressway Comm., 29 Wis. 2d 372, 139 N.W.2d 26 (1966)	22

Nichols v. Nichols, 43 Wis. 2d
346, 168 N.W.2d 876 (1969) 28

Popp v. Aberlein,
409 F.2d 309 (7th Cir. 1969) 19

In Matter of Trust of Sensenbrenner,
76 Wis. 2d 625, 252 N.W.2d 47 (1977) 40

Ex Parte Siebold,
100 U.S. 371 (1879) 17

Tarble's Case,
80 U.S. 397 (1872) 17

United States v. Dallas National Bank,
152 F.2d 582 (5th Cir. 1946) 18

United States v. Heck,
499 F.2d 778 (9th Cir. 1974),
cert. denied, 419 U.S. 1088 (1974) 38

United States v. National Bank
of Commerce,
427 U.S. 713 (1985) 18, 26, 27
30, 31, 36
37, 38

United States v. Rogers,
461 U.S. 677 (1983) 30, 33
35, 39

United States v. Town of Windsor, CT,
765 F.2d 16 (2d Cir. 1985) 19

CONSTITUTIONAL PROVISIONS **PAGE**

Article VI, Clause II of the U.S. Constitution 1, 17, 18

Article XVI, U.S. Constitution 2, 21

Treas. Reg. § 301.6334-1(c) 4, 25, 29

STATUTES

26 U.S.C. § 6236(h)(1) 24

26 U.S.C. § 6331 7, 11, 16, 21, 25 32, 34, 35, 38

26 U.S.C. § 6331(a) 31, 34

26 U.S.C. § 6331(b) 23

26 U.S.C. § 6331(d) 30

26 U.S.C. § 6332(a) 31

26 U.S.C. § 6334 23, 24, 34

26 U.S.C. § 6334(a) 4, 24

26 U.S.C. § 6334(a)(13) 24

26 U.S.C. § 6334(c) 23, 24

26 U.S.C. § 6334(e) 24

26 U.S.C. § 6335	8, 11, 21 23, 25, 35
26 U.S.C. § 6337	11, 23
26 U.S.C. § 6338	11, 25
26 U.S.C. § 6338(b)	8, 23
26 U.S.C. § 6339	25
26 U.S.C. § 6339(b)(2)	23, 35
26 U.S.C. § 6343	37, 40
26 U.S.C. § 6343(b)	34, 37
26 U.S.C. § 7402	22
26 U.S.C. § 7402(a)	22
26 U.S.C. § 7403	22, 26, 33 34, 35
26 U.S.C. § 7426	37, 40
26 U.S.C. § 7426(a)(1)	35, 38
26 U.S.C. § 7426(b)(1)	35
26 U.S.C. § 7426(b)(2)(A)	35
Wis. Stat. § 700.17(2)(a)	4, 36

Wis. Stat. § 706.02(1)(f) 4

Wis. Stat. § 804.12 13

Wis. Stat. § 814.025 13

Chapter 842, Wisconsin Statutes 6, 9

OPINIONS BELOW

The decision of the Supreme Court for the State of Wisconsin is reported as *Elfelt v. Cooper*, 168 Wis. 2d 1009, 485 N.W.2d 56 (1992). (Appendix at 101.) The decision of the Court of Appeals of the State of Wisconsin is reported as *Elfelt v. Cooper,* 163 Wis. 2d 484, 471 N.W.2d 303 (Ct. App. 1991). (Appendix at 120.)

JURISDICTION

The decision of the Supreme Court for the State of Wisconsin was entered on June 17, 1992. Jurisdiction to review the decision of the Supreme Court of the State of Wisconsin is conferred on this Court by 28 U.S.C. § 2101(c) and 28 U.S.C. § 2104.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

I. Constitutional Provisions

Article VI, Clause II of the United States Constitution provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Article XVI of the Amendments to the United States Constitution provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

II. Federal Statutes

26 U.S.C. § 6321. Lien for Taxes. (Appendix at 147.)

26 U.S.C. § 6331. Levy and Distraint. (Appendix at 147.)

26 U.S.C. § 6334. Property exempt from Levy. (Appendix at 150.)

27 U.S.C. § 6335. Sale of Seized Property. (Appendix at 152.)

26 U.S.C. § 6337. Redemption of Property. (Appendix at 156.)

26 U.S.C. § 6338. Certificate of Sale; Deed of Real Property. (Appendix at 157.)

26 U.S.C. § 6339. Legal Effect of Certificate of Sale of Personal Property and Deed of Real Property. (Appendix at 158.)

26 U.S.C. § 6343(b). Authority to Release Levy and Return Property. Return of Property. (Appendix at 160.)

26 U.S.C. § 7402. Jurisdiction of District Courts. (Appendix at 161.)

26 U.S.C. § 7403. Actions to enforce lien or to subject property to payment of tax. (Appendix at 162.)

26 U.S.C. § 7426. Civil Actions by Persons Other than Taxpayers. (Appendix at 164.)

III. Regulations of the Commissioner of the Internal Revenue Service.

Treas. Reg. § 301.6334-1(c) provides:

> (c) Other Property. No other property or rights to property are exempt from levy except the property specifically exempted by Section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes.

IV. Wisconsin Statutes.

Wis. Stat. § 700.17(2)(a) provides:

> CHARACTERISTICS OF JOINT TENANCY. (a) Each of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation. On the death of one of 2 joint tenants, the survivor becomes the sole owner; on the death of one of 3 or more joint tenants, the survivors are joint tenants of the entire interest.

Wis. Stat. § 706.02(1)(f) provides:

> Formal Requisites.
> (1) Transactions under s. 706.01(1) shall not be valid unless evidenced by a conveyance which:
> . . .

(f) is signed, or joined in by a separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) . . ..

Wis. Stat. § 842.02. Partition; Plaintiffs. (Appendix at 167.)

Wis. Stat. § 842.14. Judgment of Partition. (Appendix at 168.)

Wis. Stat. § 842.17. Interlocutory Judgment of Sale. (Appendix at 168.)

STATEMENT OF THE CASE

The petitioners, the Elfelts, (hereinafter referred to as "Elfelts") are seven brothers. They commenced this action in the Circuit Court for Waukesha County, Wisconsin against the respondent, Albina Cooper and her now-deceased husband, defendant, Dale T. Cooper. The relief requested by the Elfelts in their amended complaint was as follows:

1. Declaring the Elfelts to be owners of an undivided one-half interest as tenants-in-common with Mrs. Cooper as successors in interest of Mr. Cooper to the real property occupied by Mrs. Cooper and Mr. Cooper as their home.

2. A partition of the real estate pursuant to Chapter 842 of the Wisconsin Statutes and for a sale of the premises with the proceeds of the sale being paid into court and divided among the parties according to their respective rights and interests.

3. For the sum of $300.00 per month as and for the Elfelts' proportionate share of the reasonable rental value of the property subsequent to January 1, 1987 until such time as Mrs. Cooper and Mr. Cooper vacate the premises to be paid out of Mrs. Cooper's share of the proceeds of sale.

Elfelts alleged in their complaint that on June 25, 1986 the Internal Revenue Service (hereinafter referred to

as "IRS") sold to their parents, John and Stacy Elfelt, all the right, title and interest of Mr. Cooper in and to the real estate and that John and Stacy Elfelt quit-claimed their interest in the property to them.

On December 6, 1984, the IRS assessed Mr. Cooper for income taxes in the amount of $13,283.22 for the tax period ending December 31, 1982. Notice of the assessment was sent to Mr. Cooper on December 19, 1984.

On January 11, 1985, the IRS Filed a lien notice against the real estate interest of Mr. Cooper in Waukesha County, Wisconsin. The IRS then seized Mr. Cooper's interest in the real estate located at 38050 Dolmar Park Road, Dousman, Waukesha County, Wisconsin pursuant to 26 U.S.C. § 6331 and mailed notice of the seizure to Mr. Cooper on November 15, 1985.

On June 25, 1986, the IRS conducted a tax sale of Mr. Cooper's interest in the real estate located at 38050 Dolmar Park Road, Dousman, Wisconsin pursuant to 26

U.S.C. § 6335. Notice of the sale was mailed to Mr. Cooper on June 9, 1986, was posted at the Post Office in Dousman, Wisconsin on June 10, 1986 and was published in the *Waukesha Freeman* on June 14, 1986. At the time of the seizure and sale Mr. Cooper owned the real estate in joint tenancy with Mrs. Cooper.

Mr. John Elfelt was the successful bidder at the tax sale. He purchased Mr. Cooper's interest in the real estate on behalf of himself and his wife and paid the sum of $12,785.02.

Mr. Cooper did not redeem the property and on January 5, 1987, the District Director of the IRS executed a District Director's Quit Claim Deed to John and Stacy Elfelt pursuant to 26 U.S.C. § 6338(b). On February 2, 1987, John and Stacy Elfelt quit claimed their interest in the property to the petitioners.

On January 1, 1987 John Elfelt made written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property.

The Elfelts originally filed a pro se complaint against Mr. Cooper and Mrs. Cooper in March of 1988. The Elfelts retained legal counsel and on January 10, 1989 filed an amended summons and complaint and requested that the court declare that the Elfelts were the owners of an undivided one-half (1/2) interest as tenants in common with Mrs. Cooper as the successors in interest of Mr. Cooper, for a partition of the premises pursuant to Chapter 842 of the Wisconsin Statutes, and for the Elfelts' proportionate share of the reasonable rental value of the premises subsequent to January 1, 1987 as the Elfelts had made a written demand for such rent as of that date. In response to the Elfelts' amended summons and complaint, Mrs. Cooper and Mr. Cooper filed pro se a motion to dismiss. The motion to dismiss was denied by the Trial Court.

Mr. Cooper died on April 1, 1989. On April 25, 1989 Mrs. Cooper then filed a pro se answer to the amended complaint and another motion to dismiss with a brief in support of the motion.

On May 16, 1989, the Elfelts filed a notice of motion and motion for an order denying Mrs. Cooper's motion to dismiss and for summary judgment in favor of the Elfelts. The motion for summary judgment asked for the relief which was requested in the Elfelts' amended complaint.

Mrs. Cooper then retained legal counsel. A hearing was held on the Elfelts' motion for an order denying Mrs. Cooper's motion to dismiss and for summary judgment on June 5, 1989.

Although the Trial Court did not address whether there were issues of fact, the court stated "that this is not an appropriate case for summary judgment" and denied the Elfelts' motion. An order was entered denying the Elfelts'

motion for summary judgment and Mrs. Cooper's motion to dismiss.

On September 6, 1989, Mrs. Cooper filed a third-party summons, amended answer, affirmative defenses, and counterclaim, including a third-party complaint against John Elfelt. The answer set forth the affirmative defenses that the IRS failed to make a lawful assessment or follow proper procedures under the Internal Revenue Code, that the seizure and sale of Mr. Cooper and Mrs. Cooper's property was not in compliance with state law, that the sale and seizure was in violation of the Wisconsin State Constitution, and that the complaint failed to state a claim upon which relief could be granted. The counterclaim alleged the District Director's Quit Claim Deed was invalid due to lack of a statutorily required assessment, and that the levy and transfer was not in compliance with Sections 6331, 6335, 6337 and 6338 of Chapter 64 of the Internal Revenue Code of 1954.

John Elfelt filed a motion to dismiss the third-party complaint against him. Prior to the hearing the parties filed a stipulation for dismissal of the third-party complaint and an order was entered dismissing it.

A trial to an advisory jury was conducted on April 17, 18 and 19, 1990. At the conclusion of the evidence, the court submitted the following verdict question to the jury:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacy Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury answered the verdict question by stating, "The Internal Revenue Service did comply."

The parties each submitted motions after verdict. The Elfelts' motion requested that a judgment be entered determining that the Elfelts and Mrs. Cooper were each owners in fee simple of an undivided one-half interest in the property, that the property be sold at public auction, that the proceeds be split between the parties, that the Elfelts be

awarded rent as of January 1, 1987, and that the court award to the Elfelts reasonable attorney's fees pursuant to Sections 814.025 and 804.12 of the Wisconsin Statutes. Mrs. Cooper's motion requested the court direct entry of judgment notwithstanding the verdict. Mrs. Cooper argued that the IRS did not have the legal authority to sell the property through the administrative levy and sale procedures of the Internal Revenue Code. Mrs. Cooper also argued that the use of administrative levy procedures to sell Mr. Cooper's interest in the family homestead property would be unconstitutional.

A hearing was conducted regarding the motions on May 14, 1990. After hearing the arguments of counsel, the trial judge denied Mrs. Cooper's motion and granted the Elfelts' motion in part. The trial judge ruled that rent be paid from the date of the jury's verdict, rather than from the date of demand. Formal Findings of Fact, Conclusions

of Law and a Judgment were entered May 24, 1990. (Appendix at 140.)

Mrs. Cooper filed a notice of appeal with the Court of Appeals for the State of Wisconsin and the Elfelts subsequently filed a notice of cross appeal. Mrs. Cooper argued that the IRS did not have the legal authority to transfer ownership of Mr. Cooper's property through administrative levy procedures and that the application of the administrative levy procedures to allow the sale of Mr. Cooper's interest in the family homestead would be unconstitutional. (Court of Appeals Brief of Appellant at 7-10.) The Elfelts appealed the Trial Court's award of a proportionate share of the reasonable rental value of the property as of April 19, 1990 (the date of the jury's verdict), rather than as of January 1, 1987 (the date written demand was made for the rent). In addition, the Elfelts argued, "State courts have no jurisdiction to review the determination of a federal agency, exercising powers

conferred by federal statutes and concerning a matter over which such agency has exclusive jurisdiction." (Court of Appeals Brief of Respondent at 9 and 10.) The Court of Appeals held that the IRS had the legal authority to levy and sell Mr. Cooper's equal interest in the homestead held in joint tenancy, and entitling the Elfelts to rent and partition. (Appendix at 120.)

Mrs. Cooper petitioned the Supreme Court for the State of Wisconsin for a review of the decision of the Court of Appeals. Mrs. Cooper once again argued that the IRS did not have the legal authority to transfer ownership of Mr. Cooper's undivided one-half interest in the homestead property by the use of administrative levy procedures and that the application of the administrative levy procedures to allow the sale would be unconstitutional. (Supreme Court Brief of Petitioner at 9 and 17.) The Elfelts again argued, "State courts have no jurisdiction to review the determination of a federal agency, exercising powers

conferred by federal statutes and concerning a matter over which such agency has exclusive jurisdiction." (Supreme Court Brief of Respondents at 19.)

The Wisconsin Supreme Court held that without Mrs. Cooper's consent, and in the absence of court action, Section 6331 of the Internal Revenue Code does not give the IRS the authority to sell Mr. Cooper's interest in the homestead. The Wisconsin Supreme Court reversed the Court of Appeals and remanded to the Circuit Court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute. (Appendix at 101.) The Elfelts filed a motion with the Circuit Court for an order staying the entry of a judgment directed by the Wisconsin Supreme Court to enable them to obtain a writ of certiorari from the Supreme Court of the United States and pending the review of the decision of the Wisconsin Supreme Court. The Circuit Court granted the motion.

ARGUMENT

I. THE WISCONSIN SUPREME COURT EXCEEDED ITS AUTHORITY IN HOLDING THAT THE IRS HAD NO AUTHORITY TO SELL MR. COOPER'S UNDIVIDED ONE-HALF INTEREST BY ADMINISTRATIVE LEVY.

The Wisconsin Supreme Court does not have jurisdiction to review the acts of the Internal Revenue Service, a federal agency. Article VI, Clause II of the United States Constitution provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby*, any thing in the constitution or laws of any state to the contrary notwithstanding. (Emphasis added.)

Whenever a conflict arises between state and federal law, those of the federal law are supreme. *See e.g., Ex Parte Siebold*, 100 U.S. 371 (1879); *Tarble's Case*, 80 U.S. 397

(1872). The United States Court of Appeals for the Fifth Circuit recognized this proposition when it stated, "Having been enacted within the scope of the power delegated to the federal government, the Internal Revenue Statutes are a part of the supreme law of the land. If they are in conflict with state law, constitutional or statutory, the latter must yield." *United States v. Dallas National Bank*, 152 F.2d 582, 585 (5th Cir. 1946).

> [I]t is well established that the doctrine of federal supremacy protects the legitimate activities of the United States government from regulation by state and local authorities. See e.g., *Mayo v. United States*, 319 U.S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504 (1943). The effect of this principle, which derives from the supremacy clause, Article VI, Clause II of the Constitution, is that unless Congress clearly and affirmatively declares that federal instrumentalities shall be subject to state regulation, the federal function must be left free of such regulation. *Middleton TP. v. N/E Reg Off, U.S. Postal Serv.*, 601 F. Supp. 125, 127 (N.J. 1985).
>
> Absent congressional consent, direct state regulation of the activities of the government is barred by the supremacy clause. As the Supreme Court has stated: "Because of the fundamental importance of the principles shielding federal installations and activities

> from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous"." *United States v. Town of Windsor, CT*, 765 F. 2d 16, 18 (2d Cir. 1985). (Citing *Hancock v. Train*, 426 U.S. 167, 179, 96 S. Ct. 2006, 2013, 48 L. Ed. 2d 555 (1976).

The Wisconsin Supreme Court simply had no jurisdiction to determine what authority the IRS does or does not have, nor does it have jurisdiction to void an act of the Internal Revenue Service.

The Wisconsin Supreme Court stated that the state court was a proper forum for this action and for Mrs. Cooper's defense to the action relying upon *Popp v. Aberlein*, 409 F.2d 309, 311 (7th Cir. 1969). The Elfelts do not dispute that a state court is a proper forum for a quiet title action. However, under the Supremacy Clause, the state court was bound to enforce the Internal Revenue Code and the actions of the IRS taken pursuant thereto.

The state court had no jurisdiction to find that the IRS exceeded its authority.

Where the federal government, in the exercise of its superior authority, has enacted a complete scheme of regulation, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or compliment, the federal law, or enforce additional or auxhiliary regulations. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1940). The State of Wisconsin cannot, therefore, impose the additional requirement of Mrs. Cooper's consent in order to convey Mr. Cooper's interest in the property. State law cannot stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67.

II. THE DECISION OF THE WISCONSIN SUPREME COURT CONFLICTS WITH THE INTERNAL REVENUE CODE AND RELEVANT FEDERAL COURT DECISIONS.

A. *The Internal Revenue Service was granted the authority to sell Mr. Cooper's interest in the property by the Internal Revenue Code.*

Article XVI of the United States Constitution expressly granted Congress the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration. In accordance with Article XVI the Congress enacted the Internal Revenue Code found at Title 26 of the United States Code.

In general, the Internal Revenue Service may collect assessed taxes in one of two ways. First, the IRS can seize and detain the delinquent taxpayer's property and sell it to satisfy the tax claim. 26 U.S.C. §§ 6331 and 6335. No

judicial action or judgment is necessary in such proceedings, as the assessment supercedes the pleading, proof and judgment necessary in an action at law, and has the force of a judgment. *Bull v. United States*, 295 U.S. 247, 260 (1935), cited in *Monday v. Milwaukee County Expressway Commission*, 29 Wis. 2d 372, 379, 139 N.W. 2d 26 (1966). Second, the IRS may sue in court for the collection of delinquent taxes. 26 U.S.C. §§ 7402 and 7403. The IRS may institute a lawsuit either before or after assessment, to collect taxes, penalties, and interest, etc. or the IRS can sue after assessment to enforce a tax lien on the delinquent taxpayer's property. *Id.* However, the judicial remedies granted to the IRS are in addition to the administrative seizure and sale remedies. 26 U.S.C. § 7402(a). The IRS may choose whatever method of collection it desires. In this case, the IRS chose the administrative method of seizure and sale.

In any case in which the IRS may levy upon property, the IRS may seize and sell that property. It makes no difference whether the property is real or personal, tangible or intangible. 26 U.S.C. § 6331(b). In the case of any real property sold as provided in 26 U.S.C. § 6335 and not redeemed in the manner and within the time provided in 26 U.S.C. § 6337, the IRS shall execute to the purchaser of such real property at such sale a deed of the real property so purchased. 26 U.S.C. § 6338(b). The deed shall be considered and operate as a conveyance of all the right, title, and interest the delinquent taxpayer had in and to the real property thus sold. 26 U.S.C. § 6339(b)(2).

Section 6334(c) of the Internal Revenue Code specifically provides that "notwithstanding any other law of the United States, no property or rights to property are exempt from levy except those specifically enumerated in Code Section 6334." Nothing in § 6334 exempts from levy any right to property held in joint tenancy. On the date of

the sale, June 25, 1986, § 6334 did not contain any exemption for a homestead. A taxpayer's principal residence is only exempt from levies issued after June 30, 1989. Public Law 100-647, § 6236(h)(1), November 10, 1988, now codified at 26 U.S.C. § 6334(a)(13). However, even after June 30, 1989, the taxpayer's principal residence is not exempt if either an Internal Revenue Service District Director or an Assistant District Director personally approves the levy in writing, or the Internal Revenue Service finds that the collection of the tax is in jeopardy. 26 U.S.C. § 6334(e).

The Commissioner of the Internal Revenue Service has promulgated a regulation explaining Section 6334(c) which states:

> (c) Other Property. No other property or rights to property are exempt from levy except the property specifically exempted by Section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws

> is, nevertheless, subject to levy by the United States for collection of its taxes. Treas. Reg. § 301.6334-1(c).

The Wisconsin Supreme Court held that the IRS had no authority to transfer Mr. Cooper's undivided one-half interest in the homestead. The court held such on the premise that Section 6331 is only a provisional administrative remedy which does not determine any proprietary rights to the property. However, the Wisconsin Court of Appeals correctly recognized that Section 6331 is provisional only because third-party's rights are not resolved. 163 Wis. 2d at 495; Appendix at 130. Sections 6335, 6338 and 6339 of the Internal Revenue Code clearly grant the IRS the authority to sell a delinquent taxpayer's right, title and interest in real property.

The Wisconsin Supreme Court stated that there is no way to convey any interest in a jointly-held spousal homestead in Wisconsin without both spouses' consent except through court proceedings, such as a divorce,

bankruptcy, or lien foreclosure. 168 Wis. 2d at 1023; Appendix at 116-17. However, as the Wisconsin Court of Appeals recognized, such a limitation is a state law consequence of a property interest and it becomes inoperative to prevent an administrative levy. 163 Wis. 2d at 497; Appendix at 127. *See United States v. National Bank of Commerce*, 472 U.S. 713, 722 (1985).

In the case of *Blacklock v. United States*, 208 U.S. 75 (1908), the court stated:

> If Congress had intended to prescribe a formal suit in equity as the only mode by which the government could sell real estate upon which it had a lien for Internal Revenue taxes, and upon which private parties also had liens by mortgage or deed of trust, it would have done so in clear words, particularly as Congress knew at the time of the then-existing remedy by distraint. The words used do not show that Congress intended a suit in equity as exclusive of all other methods in such cases. 28 S.Ct. at 232.

The Wisconsin Supreme Court held that the IRS, if it wished to pursue Mr. Cooper's interest in the property, must institute a lien-foreclosure suit under Section 7403

joining Mrs. Cooper as a defendant and eliminated the alternative procedure for administrative levy under Sections 6331 and 6332. As this court stated in *United States v. National Bank of Commerce, supra* at 732-33, the alternative relief of the administrative levy has been clearly provided for the Government by Congress. While it is true that the administrative levy procedure cannot be used to sell the entire property, including Mrs. Cooper's interest, it clearly can be used to sell Mr. Cooper's undivided one-half interest.

In a levy proceeding, the IRS "steps into the taxpayer's shoes." *United States v. National Bank of Commerce, supra* at 725. The purchaser at the sale receives all the right, title, and interest of the taxpayer and, therefore, also steps into the taxpayer's shoes. In Wisconsin, persons having an interest in real property jointly with others may sue for judgment partitioning such interests unless an action for partition has been prohibited

by the Wisconsin Statutes or by agreement between the parties. Wis. Stat. § 842.02(1); Appendix at 167; *Nichols v. Nichols*, 43 Wis. 2d 346, 349, 168 N.W.2d 876 (1969). Nothing in the Wisconsin Statutes prohibits a spouse from bringing an action to partition homestead property held in joint tenancy with his or her spouse. Therefore, since Mr. Cooper could have commenced such an action while he held the property in joint tenancy with Mrs. Cooper, the Elfelts, by stepping into Mr. Cooper's shoes, also had the right to commence this action and obtain the judgment of partition granted by the trial court.

B. *The Wisconsin Supreme Court's decision conflicts with the Eighth Circuit Court of Appeals decision in Herndon v. United States, 501 F.2d 1219 (8th Cir. 1974).*

In *Herndon v. United States*, 501 F. 2d 1219 (8th Cir. 1974), the wife of the delinquent taxpayer brought an action seeking to enjoin the United States from selling the homestead property which was titled solely in her husband's

name and levied upon for unpaid taxes. She argued that the federal government could not sell the real property titled solely in her husband's name due to her alleged property interest under the Arkansas Homestead Exemption Law. The court disagreed and held that State Homestead Exemption Laws cannot preclude the United States from levying upon and selling the taxpayer's interest in the property. The court stated that the sale would not violate due process simply because the wife would not be a party to the non-judicial proceeding because the sale would only convey whatever "right, title, and interest" that the taxpayer might have under state law. The wife's rights and interest in the real property, if any, would not be conveyed, and, therefore, she would neither be a proper party nor would her due process rights be violated. *Id.* at 1220 n.4.

The *Herndon* court stated at page 1221:

> The Code and particularly [Treas. Reg. § 301.6334-1(c)] therefore, take the view that only the federal exemption statute exempts property from a federal

> levy. A necessary corollary to this view is that even if state laws do create a property interest pursuant to a homestead exemption law, the United States can still levy upon that property. *Herndon v. United States*, 501 F.2d 1219, 1221 (8th Cir. 1974).

C. *The Wisconsin Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court. Further, the Wisconsin Supreme Court has decided the federal question in a way that conflicts with the applicable decisions of this Court.*

Read together, this Court's decisions of *United States v. National Bank of Commerce*, 472 U.S. 713 (1985) and *United States v. Rogers*, 461 U.S. 677 (1983) established that the Wisconsin Supreme Court's holding is erroneous.

In *United States v. National Bank of Commerce*, *supra*, the IRS assessed federal income taxes, penalties, and interest against a taxpayer and tried to levy on the taxpayer's joint bank accounts pursuant to 26 U.S.C. § 6331(d) for the amount still due on such assessment. The United States District Court for the Eastern District of

Arkansas granted the bank's motion to dismiss and the United States Court of Appeals for the 8th Circuit affirmed and held that the IRS administrative levy was not normally intended for use as against property in which third parties had an interest or as against property bearing on its face the names of third parties. This Court reversed. The Court stated at page 719-720:

> The statutory language "all property and rights to property" appearing in § 6321 (and, as well, in §§ 6331(a) and, essentially, in 6332(a), . . .) is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. (Citation omitted.) "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." (Citation omitted.)

This Court in *National Bank of Commerce* stated that the bank's only defense was that the joint accounts did not constitute "property or rights to property" of the taxpayer. *Id.* at 722. The Court noted:

> "[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property." (Citations omitted.) This follows from the fact that

> the federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." (Citations omitted.) And those consequences are "a matter left to federal law." (Citation omitted.) "[O]nce it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative," and the tax consequences thenceforth are dictated by federal law. (Citations omitted.) *Id.*

State law defines "the nature of the taxpayer's interest in the property, but the state-law consequences of that definition are of no concern to the operation of the federal tax law." *Id.* at 723.

The Court, however, did not address the issue presented here. In a footnote the Court stated:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under § 6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts. *Id.* at 726 n.10.

Although the Court has not addressed the issue of whether or not the administrative levy procedures give the

IRS the authority to sell a taxpayer's undivided one-half interest in a jointly held homestead, the decision of *United States v. Rogers*, 461 U.S. 677 (1983) makes it clear that such authority exists. The issue in *Rogers* was whether Section 7403 of the Internal Revenue Code empowered a federal district court to order the sale of the *entire* family home in which a delinquent taxpayer had an interest at the time he incurred his indebtedness, but in which the taxpayer's spouse, who does not owe any of that indebtedness, also has a separate homestead right as defined by Texas law. *Id.* at 680. Although the case involved a judicial foreclosure, the Court specifically recognized the administrative levy procedures as a method for the collection of delinquent taxes. *Id.* at 682-83.

The Court noted in *Rogers* that the Texas homestead laws provided that the owner or claimant of the property claimed as homestead may not, if married, sell or abandon the homestead without the consent of the other spouse. *Id.*

at 684-85. The Court did not, however, hold, as did the Wisconsin Supreme Court here, that the requirement of spousal consent prohibited an administrative levy and sale. Such a restrictive reading flies in the face of the plain language of the Internal Revenue Code, especially Section 6334 which provides the exemptions to the administrative levy and sale. As the court stated:

> [O]ur reading of the statute is significantly bolstered by a comparison with the statutory language setting out the administrative levy remedy also available to the Government. Under 26 U.S.C. § 6331(a), the Government may sell for the collection of unpaid taxes all non-exempt "property and rights to property . . . *belonging to such person* [*i.e.*, the delinquent taxpayer] or on which there is a lien provided in this chapter for the payment of such tax" (emphasis added). This language clearly embodies the limitation that the Court of Appeals thought was present in § 7403, and it has been so interpreted by the courts. Section 6331, unlike § 7403, does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by § 6331. Indeed, third parties whose property or interests in property have been seized inadvertently are entitled to claim that the property has been "wrongfully levied upon" and may apply for its return either through administrative channels, 26 U.S.C. § 6343(b), or through a civil action filed in a

federal district court, § 7426(a)(1); see §§ 7426(b)(1), 7426(b)(2)(A). *Id.* at 695-96.

Section 6331 and 6335 are intended to permit the IRS to convey "all the right, title and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto." 26 U.S.C. § 6339(b)(2). Therefore, the state-created homestead exemptions against forced sale are not effective, just as the Texas state-created exemptions against forced sale were not effective in *Rogers*. *Id.* at 700-01. Just as this Court declined to frustrate the policy of Section 7403 by reading an exception of the sort carved out by the Court of Appeals in *Rogers* since no such exception appeared on the face of the statute, the Court should refuse to carve out such an exception to Sections 6331 and 6335. The dissent in *Rogers* urged the Court to carve out an exception from the plain language of Section 7403 in that small number of joint-ownership situations in which the delinquent taxpayer

had no right to force partition or otherwise to alienate the entire property without the consent of the co-owner. However, the Court refused to do so. *Id.* at 702.

Mrs. Cooper's only defense in this case is that Mr. Cooper did not have an interest in the real estate. However, he clearly did. In Wisconsin, each of two or more joint tenants has an equal interest in the whole property for the duration of the tenancy. Wis. Stat. § 700.17(2)(a). In other words, Mr. Cooper had an undivided one-half interest in the real estate with Mrs. Cooper.

"The question whether a state-law right constitutes "property" or "rights to property" is a matter of federal law." *United States v. National Bank of Commerce*, *supra* at 727. "That another party or parties may have competing claims . . . is not a legitimate statutory defense." *Id.*

This Court in *National Bank of Commerce* noted that other claimants, if they feel they have rights in and to the property, may assert them.

> Congress recognized this when the Code's summary-collection procedures were enacted . . . and when it provided in Section 7426 of the Code . . . that one claiming an interest in property seized for another's taxes may bring a civil action against the United States to have the property or the proceeds of its sale returned. Congress also has provided, by § 6343(b), an effective and inexpensive administrative remedy for the return of the property. *Id.* at 728.

Mrs. Cooper's remedies, if any she may have, were available to her pursuant to sections 6343 and 7426 of the Internal Revenue Code. Both of these sections provide a remedy as long as a claim is made within nine (9) months of the date of the levy. State court was simply not the proper forum for Mrs. Cooper to be making her arguments. Even the dissent in *National Bank of Commerce* recognized that "If an individual discovers a levy and believes that it was wrongful, his or her only recourse is to seek administrative review under 26 U.S.C. § 6343(b) within nine (9) months or file suit in federal district court under 26

U.S.C. § 7426(a)(1) within the same amount of time." *Id.* at 736.

III. THE ADMINISTRATIVE LEVY PROCEDURES, AS APPLIED, ARE CONSTITUTIONAL.

Although the Wisconsin Supreme Court did not reach Mrs. Cooper's constitutional arguments, the court stated that it was doubtful of the constitutionality of the actions of the IRS in this case. 168 Wis. 2d 1009, 1019-20 n.3; Appendix at 111.

The levy and distraint procedures of Section 6331 have been repeatedly upheld as constitutional. *Ginter v. Southern*, 611 F.2d 1226 (8th Cir. 1979), cert. denied, 446 U.S. 967 (1980); *U.S. v. Heck*, 499 F.2d 778 (9th Cir. 1974), cert. denied, 419 U.S. 1088 (1974).

"The constitutionality of the levy procedure, of course, 'has long been settled.'" *United States v. National Bank of Commerce*, *supra* at 721. Certainly, if the administrative levy procedure can be used to seize a

co-depositor's interest in a joint bank account, leaving the co-depositor with nothing, it can apply to a taxpayer's interest in real property which leaves the other co-tenant's interest intact. As pointed out in Section II hereof, this was recognized by the Eighth Circuit Court of Appeals in *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974).

Further, as this Court noted in *Rogers*, if there were any Takings Clause objection to the administrative levy procedures, such an objection could not be envoked on behalf of property interests that came in to being after enactment of those provisions of the Internal Revenue Code. 461 U.S. at 697 n.24. In this case, as in *Rogers*, the homestead estate at issue came in to being long after enactment of the Internal Revenue Code.

In any event, the parties never litigated the issue of whether or not Mrs. Cooper received actual notice of the levy and sale. Although Mrs. Cooper testified as a witness at the time of trial, she did not testified that she never

received any notice of either the levy or the sale. "The Trial Court, in view of the facts that the issue had not been previously raised and argued, and that no evidence concerning the issue was introduced, properly declined to consider the issue." *In Matter of Trust of Sensenbrenner*, 76 Wis. 2d 625, 647, 252 N.W.2d 47 (1977).

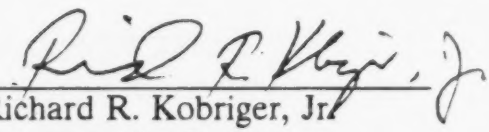
Nevertheless, Mrs. Cooper did have actual knowledge of the levy and sale. Jack H. Phillips, a revenue officer for the Internal Revenue Service, testified at the time of trial that Mrs. Cooper was present when he went to the Cooper residence to serve Mr. Cooper with the papers. (Trial Court transcript of testimony of Jack H. Phillips, Rec. 28 at pp. 4 and 5.) Further, Mrs. Cooper did have actual knowledge of the levy and sale within a sufficient time period to seek administrative review under Sections 6343 and 7426 of the Internal Revenue Code. John Elfelt made written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property on

January 1, 1987. (Rec. 23 at Exhibit 31). In the written demand Mr. Elfelt told Mrs. Cooper he was going to be receiving a District Director's Quit Claim Deed to Mr. Cooper's interest in the property. Mrs. Cooper admitted she received Mr. Elfelt's written demand. (Rec. 23 at Exhibit 36, p. 14). Since the sale occurred on June 25, 1986, Mrs. Cooper still had until March 25, 1987 to seek administrative review.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
CRAMER, MULTHAUF & HAMMES

By: 
Richard R. Kobriger, Jr.
Attorneys for Petitioners

APPENDIX

TABLE OF CONTENTS

	PAGE
1. Decision of the Supreme Court for the State of Wisconsin, *Elfelt v. Cooper*, 168 Wis. 2d 1009, 485 N.W.2d 56 (1992)	101
2. Decision of the Court of Appeals of the State of Wisconsin, *Elfelt v. Cooper*, 163 Wis. 2d 484, 471 N.W. 303 (Ct. App. 1991)	120
3. Findings of Fact, Conclusions of Law and Judgment of the Circuit Court for Waukesha County, Wisconsin, *Elfelt v. Cooper*, 88-CV-0960 (May 24, 1990)	140
4. 26 U.S.C. § 6321, Lien for Taxes	147
5. 26 U.S.C. § 6331, Levy and distraint	147
6. 26 U.S.C. § 6334, Property exempt from levy	150
7. 26 U.S.C. § 6335, Sale of seized property	152
8. 26 U.S.C. § 6337, Redemption of property	156
9. 26 U.S.C. § 6338, Certificate of sale; deed of real property	157
10. 26 U.S.C. § 6339, Legal effect of certificate of sale of personal property and deed of real property	158

11. 26 U.S.C. § 6343, Authority to release levy and return property 160

12. 26 U.S.C. § 7402, Jurisdiction of district courts 161

13. 26 U.S.C. § 7403, Action to enforce lien or to subject property to payment of tax 162

14. 26 U.S.C. § 7426, Civil actions by persons other than taxpayers 164

15. Wis. Stat. § 842.02, Partition; plaintiffs 167

16. Wis. Stat. § 842.14, Judgment of partition 168

17. Wis. Stat. § 842.17, Interlocutory judgment of sale 168

No. 90-1326

STATE OF WISCONSIN : IN SUPREME COURT

James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt, and Steven M. Elfelt,

Plaintiffs-Respondents-Cross Appellants,

v.

Albina Cooper,

Defendant-Appellant-Cross Respondent-Petitioner,

Dale T. Cooper,

Defendant.

REVIEW of a decision of the Court of Appeals. Reversed and remanded.

LOUIS J. CECI, J. This case is before the court on a petition for review of a published decision of the court of appeals, Elfelt v. Cooper, 163 Wis. 2d 484, 471 N.W.2d 303 (Ct. App. 1991). The court of appeals affirmed the judgment of the circuit court for Waukesha County, Clair Voss, Circuit Judge, which declared, after a jury trial,

that the plaintiffs (the Elfelts) were owners of an undivided one-half interest in the home of the defendant Albina Cooper (Mrs. Cooper) as tenants in common. The judgment ordered a sheriff's sale of the property and determined an amount of rent due from Mrs. Cooper to the Elfelts.

The issue presented for review is whether § 6331 of the Internal Revenue Code, 26 U.S.C. § 6331 (I.R.C. § 6331),[1] gives the Internal Revenue Service (IRS) the

---

[1] I.R.C. §6331 provides in relevant part:

§6331. Levy and distraint

(a) Authority of Secretary

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . .

(b) Seizure and sale of property

The term "levy" as used in this title includes the power of distraint and seizure by any means. . . . In any

authority to sell Dale Cooper's (Mr. Cooper) undivided one-half interest in Mr. and Mrs. Cooper's homestead held in joint tenancy. We hold that without Mrs. Cooper's consent, and in the absence of court action, I.R.C. § 6331 does not give the IRS the authority to sell Mr. Cooper's interest in the homestead, and we therefore reverse the court of appeals and remand to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

The facts are as follows. In 1963, the Coopers purchased the property at 38050 Dolmar Park Road, Dousman, Wisconsin, as husband and wife.[2] In 1969, construction of a home on the property was completed, and

---

case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

[2] The property is more particularly described as:

Lot 18 in Dolmar Park, a subdivision of part of the NE 1/4 of the SE 1/4 of Section 17, and the NW 1/4 and the SW 1/4 of the SW 1/4 of Section 16, in Township number 6N, Range 17 East, in the town of Ottawa, Waukesha County, Wisconsin.

the Coopers moved in. As of the time the briefs in this case were filed, Mrs. Cooper was age 70 and had lived in the homestead for over 21 years.

On January 11, 1985, the IRS filed a lien notice against the real estate of Mr. Cooper in Waukesha County. The lien was in the amount of $13,283.22 and was for unpaid income taxes for the year 1982. It is undisputed that Mrs. Cooper was not liable for any taxes unpaid by Mr. Cooper. On November 15, 1985, after Mr. Cooper did not pay the amount in dispute, the IRS mailed notice to Mr. Cooper that the IRS had seized Mr. Cooper's interest in the homestead on Dolmar Park Road. The Coopers continued to live in the home after the seizure.

On June 25, 1986, the IRS conducted a tax sale of Mr. Cooper's interest in the home. The successful bidders were John and Stacey Elfelt. On January 1, 1987, John Elfelt made a written demand upon Mrs. Cooper for a proportionate share of the reasonable rental value of the property. On January 5, 1987, the IRS district director issued a quitclaim deed for the interest of Mr. Cooper to John and Stacey Elfelt. John and Stacey Elfelt issued a quitclaim deed to their seven sons, the plaintiffs in this matter.

On March 28, 1988, the Elfelts filed a summons and complaint, which was later amended, requesting that the court declare the Elfelts owners of an undivided one-half interest in the property with Mrs. Cooper as tenants in common, requesting a partition of the property by its sale with one-half of the proceeds to go to the Elfelts, plus rent in the amount of one-half the reasonable rental value of the property subsequent to January 1, 1987. The Coopers both filed pro se motions to dismiss. After a hearing on March 13, 1989, the circuit court denied the Coopers' motions to dismiss. On April 1, 1989, Mr. Cooper died.

Mrs. Cooper filed a pro se answer and a motion to dismiss on April 25, 1989. The Elfelts responded with a motion for summary judgment. Mrs. Cooper retained counsel, and, after a hearing, the circuit court denied both parties' motions.

On September 6, 1989, Mrs. Cooper filed a third-party summons and complaint, an amended answer, affirmative defenses, and a counterclaim for quiet title. The third-party complaint was dismissed by stipulation of the parties. The amended answer and affirmative defenses alleged that the IRS failed to follow certain procedures mandated by the I.R.C., that the seizure and sale was

invalid, and that the quitclaim deed to John and Stacey Elfelt was therefore invalid.

The case was finally tried in April, 1990, to an advisory jury. The court reserved for itself the legal question of whether the IRS had the legal authority to sell Mr. Cooper's interest in the homestead in the manner and form accomplished. The jury was asked to answer one verdict question:

> Did the Internal Revenue Service comply with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin?

The jury's answer was "They (the Internal Revenue Service) did comply." Mrs. Cooper filed a motion for judgment notwithstanding the verdict, which was denied. The court entered judgment for the Elfelts, finding that the IRS had legally sold Mr. Cooper's interest in the homestead to the Elfelts; declaring the Elfelts and Mrs. Cooper to be tenants in common, each owning in fee simple an undivided one-half interest in the property; ordering a sheriff's sale to partition the property; and ordering Mrs. Cooper to pay rent to the Elfelts.

The court of appeals affirmed the circuit court judgment and remanded for further findings. Elfelt, 163 Wis. 2d at 501-02. We granted Mrs. Cooper's petition for review.

The issue presented by this case, whether I.R.C. § 6331 gives the IRS the authority to sell Mr. Cooper's undivided one-half interest in Mr. and Mrs. Cooper's homestead, involves the application of a statute to an undisputed set of facts. Statutory interpretation is a question of law which we review without deference to the lower courts. Pulsfus Farms v. Town of Leeds, 149 Wis. 2d 797, 803-04, 440 N.W.2d 329 (1989). The jury's verdict in this case, which was advisory only, found that the IRS had complied with the legal requirements in selling Mr. Cooper's interest to John and Stacey Elfelt. We do not review that verdict.

Mrs. Cooper argues that the IRS did not have the authority to transfer ownership of Mr. Cooper's ownership interest in the Coopers' homestead to the Elfelts in the manner and form accomplished: that because the property was a jointly held homestead, it may only be sold with Mrs. Cooper's consent or by a court order in the absence of Mrs. Cooper's consent. Mrs. Cooper also argues that homestead property is indivisible and that therefore, under I.R.C. §

6335, it was improper to sell Mr. Cooper's interest without selling the property in its entirety. Finally, Mrs. Cooper argues that I.R.C. § 6331 is unconstitutional as applied because it does not require that the IRS give notice to all parties having an interest in property before the property is sold.

The Elfelts respond that the IRS did have the authority, under I.R.C. §§ 6331, 6335, 6338, and 6339, to sell Mr. Cooper's undivided one-half interest in the homestead without Mrs. Cooper's consent. In addition, the Elfelts argue that Mrs. Cooper was given remedies by I.R.C. §§ 6337, 6343, and 7426 that she failed to use, that the constitutionality of I.R.C. § 6331 has long been settled, and that state court is not the proper forum for Mrs. Cooper's arguments.

We first note that the state court was a proper forum for this action and for Mrs. Cooper's defense to the action. The Elfelts, not Mrs. Cooper, commenced this action in the state court, seeking to enforce whatever interest they obtained from the IRS, seeking rent from Mr. and Mrs. Cooper, and seeking to have the home sold. The Elfelts should not now complain about Mrs. Cooper presenting her defenses to the action in a forum that the Elfelts chose. In addition, due to Mrs. Cooper's counterclaim, we view this

as a quiet title action. As stated by the U. S. Court of Appeals for the 7th Circuit in a case concerning federal tax sales of parcels of land located in Wisconsin:

> Controversies over title to land within a state are particularly appropriate for determination by the courts of that state. We find nothing anywhere to imply that state courts lack power to decide such questions in a quiet title action on the ground that the conveyances were governed by federal law and were an exercise of federal power.

Popp v. Eberlein, 409 F.2d 309, 311 (7th Cir. 1969). This controversy is properly in the state court system.

The I.R.C. provides the IRS at least three methods of enforcing collection of unpaid taxes. First, the government may sue for the unpaid amount and, if it obtains a judgment, may exercise the usual rights of a judgment creditor. United States v. Rodgers, 461 U.S. 677, 682 (1983) (citing I.R.C. §§ 6502(a), 7401, and 7402(a)).

A second method is a lien foreclosure suit, authorized by I.R.C. § 7403. The suit is a civil action brought in federal district court "to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of

the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." I.R.C. § 7403(a). Pursuant to I.R.C. § 7403(b), "[a]ll persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." The suit is a plenary action which requires the court to "adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property." I.R.C. § 7403(C).

A third method that the IRS has for enforcing collection of unpaid taxes is the administrative levy, authorized by I.R.C. § 6331. Under I.R.C. § 6331, the IRS may levy upon and sell the property of a delinquent taxpayer in order to satisfy the tax liability of that taxpayer. As opposed to the plenary nature of a lien foreclosure suit, the levy and distraint authorized by I.R.C. § 6331 is only a provisional method that typically does not require judicial intervention. United States v. National Bank of Commerce, 472 U.S. 713, 720 (1985). In addition, "§ 6331, unlike § 7403, does not 'implicate the rights of third parties,' because an administrative levy, unlike a judicial lien-foreclosure action, does not determine the ownership rights to the property." Id. at 731. If parties other than the delinquent taxpayer claim rights in the levied property, they may assert those rights in a postseizure administrative or judicial

proceeding under I.R.C. § 6343 or § 7426. Id. at 728-29. Parties proceeding under I.R.C. §§ 6343 and 7426 have nine months from the time of the levy to assert their property rights in the levied property. Id. at 736 (Powell, J., dissenting). In addition, property that is sold after it is levied upon may be redeemed by the property owners or any person having an interest therein at any time within 180 days after the sale of the property. I.R.C. § 6337(b).

Mrs. Cooper did not avail herself of the procedures provided in I.R.C. §§ 6337(b), 6343, or 7426. If she had, this case would probably not be before us today. Instead, Mrs. Cooper argues that the IRS did not have the authority to sell Mr. Cooper's interest in the homestead property without Mrs. Cooper's consent and that the sale is, therefore, invalid. We agree.[3]

---

[3] Accordingly, we do not reach Mrs. Cooper's argument under I.R.C. § 6335(c) that the property was indivisible and that therefore the IRS should have sold the entire homestead, not just Mr. Cooper's interest. As we find that the IRS did not have the authority to sell Mr. Cooper's interest in the property by administrative sale without Mrs. Cooper's consent, we need not reach the Elfelts' argument that Mrs. Cooper failed to use the remedies provided to her by I.R.C. §§ 6337, 6343, and 7426.

We also do not reach Mrs. Cooper's constitutional

In applying the I.R.C., state law determines the nature of the legal interest which the taxpayer had in the

---

arguments. Although the U. S. Supreme Court has stated that "[t]he constitutionality of the levy procedure, of course, 'has long been settled,'" National Bank, 472 U.S. at 721 (citations omitted), we are doubtful of the constitutionality of the actions of the IRS in this case. If we were not to reverse the court of appeals, the IRS's actions would have led to Mrs. Cooper's no longer having a right of survivorship in her spousal homestead, thereby greatly diminishing the value of her property interest. The court of appeals was incorrect when it stated that "[Mrs. Cooper] has the same interest after the sale that she did before the sale." Elfelt, 163 Wis. 2d at 496. Before the sale, Mrs. Cooper had an equal undivided jointly held interest in the whole of the homestead with Mr. Cooper, with a right of survivorship. After the sale, she had an interest in one-half of the property as a tenant in common, with no right of survivorship. This diminution in the value of her property interest, without any requirement that she be given adequate notice by the IRS, puts the application of I.R.C. § 6331 into serious constitutional doubt. See Mennonite Board of Missions v. Adams, 462 U.S. 791, 795-800 (1983) (Prior to an action that will affect an interest in life, liberty, or property protected by the due process clause, a state must provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mere notice by publication is not sufficient when interested parties can be notified by more effective means such as personal service or mailed notice.).

homestead property. National Bank, 472 U.S. at 722. This is because the I.R.C. does not create any property rights, but merely attaches federally defined consequences to rights which are created under state law. Id. Once state law has been used to determine the nature and existence of a property interest, further state law is inoperative, and the tax consequences thenceforth are dictated by federal law. Id. (citing United States v. Bess, 357 U.S. 51, 56-57 (1958)). In a levy proceeding, the IRS "'steps into the taxpayer's shoes' . . . [and] acquires whatever rights the taxpayer himself possesses." Id. at 725 (citations omitted).

In National Bank, the delinquent taxpayer was a codepositor in two jointly held bank accounts. Id. at 716. Relevant state law provisions, as well as the taxpayer's contract with the bank, gave the taxpayer the unqualified right to withdraw the full amounts on deposit in the joint accounts without notice to his codepositors. Id. at 723. The Court stated:

> '[I]t is inconceivable that Congress . . . intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor.' . . . The taxpayer's right to withdraw is analogous in this sense to the

> IRS's right to levy on the property and secure the funds. Both actions are similarly provisional and subject to a later claim by a codepositor that the money in fact belongs to him or her.

Id. at 726 (citations and footnote omitted). In a footnote to the above quote, the Court stated:

> We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under § 6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts.

Id. at 726 n.10.

Following National Bank, we must first look to state law to determine the nature and existence of Mr. Cooper's property right in the homestead. Once that is determined, further state law consequences are inoperative, and we must turn to federal law. We bear in mind that the IRS cannot

gain an interest superior to that which Mr. Cooper himself held

Under Wisconsin law, the nature of homestead property held in joint tenancy between husband and wife is such that it is indivisible by one spouse without the consent of the other. Sec. 706.02(1)(f), Stats.[4] The policy objectives of the homestead statute have been long recognized as laudable, providing to each spouse absolutely inalienable rights:

> The policy of the statute indicated is not to give the wife a mere personal right for her personal benefit which she may waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it,–a beneficent policy of the highest character, calling for a broad, liberal

---

[4] Sec. 706.02(1)(f), Stats., provides in relevant part: **706.02 Formal requisites.** **(1)** Transactions under s. 706.01(1) shall not be valid unless evidenced (continued) by a conveyance which:

. . .

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) . . . .

> application of the statute, so as to carry it out, fully, in letter and spirit. If it should be held that the homestead right is a mere privilege which the wife may waive, or which may be lost under the rules of equitable estoppel, a very efficient way would be open to evade and nullify the statute. Such right is placed high above the reach of any dangers by the absolute disability to alienate the homestead in any manner, except by a joint conveyance of some kind, signed by the husband and wife. The disability of the husband to otherwise convey the homestead is as complete as if it were not alienable at all, and of the wife to otherwise consent to such alienation, as if she were a minor.

Cumps v. Kiyo, 104 Wis. 656, 662, 80 N.W. 937 (1899). While the above-quoted language is dated, it illustrates the nature of the property right that a spouse owns in a homestead in Wisconsin: it is absolutely inalienable without the consent of both spouses and is therefore worthless to one spouse acting alone without the consent of the other.

There is no way to convey any interest in a jointly held spousal homestead in Wisconsin without both spouses'

consent except through court proceedings, such as a divorce, bankruptcy, or lien foreclosure. This requirement of spousal consent for the extrajudicial conveyance of any interest in jointly held homestead property is not a mere consequence of a property interest that becomes inoperative under federal law, as the court of appeals incorrectly determined. Elfelt, 163 Wis. 2d at 493, 497. Rather, the statutory requirement of spousal consent illustrates that the nature of the property interest owned by a spouse in a jointly held homestead is a limited interest that can only be alienated with the consent of both spouses or by court action.

Mr. Cooper's interest in the Coopers' spousal homestead is distinguishable from the joint bank account in National Bank, where the delinquent taxpayer had access to the entire amount without prior consent of his codepositors. A homestead held jointly by a husband and wife is of an entirely different nature than a joint tenancy between persons who are not married: no interest of a homestead held jointly by a husband and wife can be conveyed without the consent of both spouses, sec. 706.02(1)(f), Stats.; while joint tenants who are not married have the right to sell their individual interests and thereby sever the joint tenancy. Nelson v. Albrechtson, 93 Wis. 2d 552, 563, 287 N.W.2d 811

(1980) (citing Nichols v. Nichols, 43 Wis. 2d 346, 349, 168 N.W.2d 876 (1969)).

As Mr. Cooper would not be able to convey any interest of the jointly held spousal homestead without Mrs. Cooper's consent, the IRS, which merely steps into Mr. Cooper's shoes, also cannot convey any interest of the jointly held spousal homestead without either Mrs. Cooper's consent or court action. Due to the nature of Mr. Cooper's property interest under Wisconsin law, any conveyance of that interest by the IRS without Mrs. Cooper's consent and without court action is ineffective. Consequently, the Elfelts did not obtain and do not now own an interest in Mrs. Cooper's homestead.

We recognize that if the IRS had proceeded under I.R.C. § 7403 and brought a lien foreclosure action in district court, the IRS might validly have conveyed an interest in the Coopers' jointly held spousal homestead. But even under I.R.C. § 7403 the IRS would have to convince the court that such action would be equitable. See Rodgers, 461 U.S. at 709 (courts should exercise limited equitable discretion in I.R.C. § 7403 proceedings; I.R.C. § 7403 empowers a district court to order the sale of a family house in which a delinquent taxpayer has an interest, even

though a nondelinquent spouse also has a homestead interest in the house under state law).

As Mr. Cooper is deceased and because we hold that the IRS did not validly convey any interest in the homestead to the Elfelts, Mrs. Cooper now owns the property in fee simple absolute under her right of survivorship. We therefore remand this matter to the circuit court and direct that the court enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

By the Court.–The decision of the court of appeals is reversed, and the matter is remanded to the circuit court with directions to enter judgment declaring Mrs. Cooper to be the sole owner of the property in fee simple absolute.

No. 90-1326

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

JAMES M. ELFELT,
JOSEPH P. ELFELT,
ANTHONY J. ELFELT,
LAWRENCE W. ELFELT,
PAUL G. ELFELT,
DAVID C. ELFELT and
STEVEN M. ELFELT,
Plaintiffs-Respondents-
Cross Appellants,

v.

ALBINA COOPER,
Defendant-Appellant-
Cross Respondent,

DALE T. COOPER,
Defendant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha county: CLAIR VOSS, Judge. *Affirmed in part, reversed in part and cause remanded with directions.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

ANDERSON, J. Albina Cooper appeals from a judgment declaring the respondents (the Elfelts) owners of an undivided one-half interest in Albina's home, ordering a partition of the property and determining rent due from Albina to the Elfelts. The Elfelts acquired their interest after the Internal Revenue Service (IRS) levied upon and sold Dale Cooper's equal interest in the home to satisfy his income tax arrears. The Elfelts cross-appeal and argue that Albina brought frivolous claims and defenses and refused to admit facts later proven at trial. The Elfelts also argue that Albina's appeal is frivolous. The Elfelts request attorney's fees for each of their claims. We hold that the Elfelts may receive rent and partition, and that Albina's claims, defenses and appeal were not frivolous. However, we remand for the trial court to make the necessary factual findings to determine whether it was reasonable for Albina to refuse to admit facts later proven at trial.

Dale Cooper and his wife, Albina, owned their homestead as joint tenants. Dale was delinquent in his income taxes, but Albina was not liable for any delinquent income taxes. The IRS placed a levy on Dale's interest in the property pursuant to 26 U.S.C. (I.R.C.) sec. 6331 (West Supp. 1989). After the period of redemption expired, the IRS sold Dale's interest to John and Stacy Elfelt by a quitclaim deed. They subsequently granted a quitclaim deed to their children. The children (the Elfelts) brought an action against Albina for rent and to partition the property. Dale died just before trial.

The issue at trial was whether the IRS complied with the statutory requirements in selling Dale's property interest. The jury found that the IRS did comply with the legal requirements. Therefore, the Elfelts had title, and the trial court granted the Elfelts' request for rent and partition.

Albina appeals and argues that because the IRS lacked the legal authority to sell Dale's interest in their homestead, the Elfelts do not have good title and they cannot receive rent or partition.[1] The Elfelts cross-appeal

---

[1] State courts have the power to decide questions in a quiet title action although the conveyances were governed by federal law and were an exercise of federal

and claim that Albina made frivolous claims and defenses and they request attorney's fees. The Elfelts also claim that because Albina refused to admit facts later proven at trial, they should receive attorney's fees for proving those facts.

APPEAL

The first issue is whether I.R.C. sec. 6331 gave the IRS the legal authority to levy and sell Dale's equal interest in the homestead held in joint tenancy.[2] The jury's

---

power. *Popp v. Eberlein*, 409 F.2d 309, 311 (7th Cir.), *cert. denied*, 396 U.S. 909 (1969).

[2] 26 U.S.C. (I.R.C.) sec. 6331, (West Supp. 1989) provides in relevant part:

> (a) Authority of Secretary.–If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . .

factual findings are not disputed on appeal. The application of a statute to an undisputed set of facts presents a question of law which this court reviews without deference to the trial court. *ParkBank-West v. Mueller,* 151 Wis.2d 476, 482, 444 N.W.2d 754, 757 (Ct. App. 1989). The IRS code provides that if any person does not pay income tax, a lien shall attach on "all property and rights to property" belonging to the person. I.R.C. sec. 6331(a). The language "all property and rights to property" is broad and reveals that Congress meant to reach every interest in property that a taxpayer may have. *United States v. National Bank of Commerce,* 472 U.S. 713, 719-20 (1985). Because a lien is not self-executing, affirmative action by the IRS is required. *Id.* There are two tools for collection: a lien-foreclosure suit pursuant to I.R.C sec. 7403 and a collection of unpaid

---

> (b) Seizure and sale of property.–The term "levy" as used in this title includes the power of distraint and seizure by any means. . . . In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

tax by administrative levy, including the power to seize and sell, pursuant to I.R.C. sec. 6331.[3] *National Bank*, 472 U.S. at 720.

National Bank sets forth the appropriate analysis.[4] "'[O]nce it has been determined that state law

---

[3] Section 71.91(6), Stats., is an administrative levy provision similar to I.R.C. sec. 6331. In Wisconsin, the state may collect tax arrears by levying and selling "any property belonging to that person."

Section 71.91(6)(b). The levying power in Wisconsin is broader than the IRS because in Wisconsin "[no] property of any person is exempt from levy and sale. . . ." Section 71.91(6)(f)6. By contrast, the IRS code provides exemptions to the administrative levy and sale. I.R.C. sec. 6334. A recent amendment to the IRS code exempts a taxpayer's principal residence from levies with a few exceptions. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, sec. 6236(c)(4)(A), 102 Stat. 3342, 3739. The amendment does not apply to levies before July 1, 1989. *Id.* at sec. 6236(h)(1), 102 Stat. at 3740-41.

[4] In footnote 10 of *United States v. National Bank of Commerce,* 472 U.S. 713, 726 (1985), the court limited its holding to property interests of joint bank accounts. The Court concluded that a codepositor has a state property interest which could be attached by an administrative levy because the codepositor has a right to withdraw funds. *Id.* at 724. The Court did not decide if other state created property interests were subject to an administrative levy. We find the general analysis persuasive as applied to

creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative', and the tax consequences thenceforth are dictated by federal law." *Id.* at 722, *quoting United States v. Bess,* 357 US 51, 56-57 (1958). Furthermore, "state law define[s] the nature of the taxpayer's interest in the property, but the state-law consequences of that definition are of no concern to the operation of the federal tax law." *National Bank,* 472 U.S. at 723. Because the tax consequences attach to "property" or "rights to property," the threshold question is whether Dale had "property" or "rights to property" under Wisconsin law.

Dale and Albina owned their homestead as joint tenants. Each of two or more joint tenants has an equal interest in the whole property for the duration of the tenancy. Section 700.17(2)(a), Stats. Joint tenants have the right to sell their shares or seek and obtain partition. *Nichols v. Nichols, 43* Wis.2d 346, 349, 168 N.W.2d 876, 878 (1969); *see also* sec. 842.02, Stats. A joint tenant, absent some prohibition of a specific nature, always has the power to sell his or her interest. *Lutzke v. Lutzke,* 122 Wis.2d 24,

---

interest in real property and we will rely on *National Bank* for the analysis and application of the IRS code.

32, 361 N.W.2d 640, 644 (1985). Therefore, Dale's equal interest in their home was a "right to property" under Wisconsin law, and the federal tax consequences of I.R.C. sec. 6331 apply. Because homestead and joint tenancy property were not listed as a type of property exempted from federal seizure in I.R.C. sec. 6334, the federal tax consequences included seizing and selling Dale's right to the property. *See* I.R.C. sec. 6331; *see also* footnote 3. The restrictions accompanying homesteads and joint tenancies are state law consequences of the rights to the property. For example, a state law consequence of a property interest existing as a homestead is that a conveyance must contain both spouses' signatures. Section 706.02(1)(f), Stats. A state law consequence, such as the signature requirement, is inoperative and does not prevent the levy and sale of Dale's right to the property. *See National Bank,* 472 U.S. at 722-23. Furthermore, it has been held that state homestead exemptions do not prevent the IRS from levying Dale's right to the property. *See United States v. Hoffman,* 643 F. Supp. 346, 349 (E.D. Wis. 1986).

In *State Bank of Drummond v. Christophersen,* 93 Wis.2d 148, 157, 286 N.W.2d 547, 552 (1980), the Wisconsin Supreme Court held that a transaction is void if a joint tenant attempts to convey the entire interest without

the signature of the other joint tenant. *Drummond* does not prevent the conveyance in this case because only Dale's property interest, and not the entire property, was sold.

Albina argues that the IRS was without legal authority to seize and sell Dale's property interest in their homestead. She relies on language in *National Bank* which explicitly states that I.R.C. sec. 6331 is a provisional remedy which allows the IRS to levy on the property immediately and leave ownership disputes to be resolved in post-seizure administrative or judicial proceedings. *National Bank*, 472 U.S. at 728-31. She argues that because administrative proceedings were absent, the IRS had no authority to sell the property.

The language Albina relies upon is in the Supreme Court's discussion of the rights of third parties and whether or not the third parties' rights must be protected before the property is seized. *Id.* We conclude that the language does not limit the IRS's authority to sell the property after seizure pursuant to I.R.C. sec. 6331. The Supreme Court recognized that, although third parties' interests may be indirectly implicated in I.R.C. sec. 6331 actions, third parties' interests do not prevent the IRS from levying the property under I.R.C. sec. 6331. National Bank, 472 U.S. at 728-31. The Court pointed out that I.R.C. sec.

7403 is the tool which can adjudicate all interested parties' rights in one proceeding. Conversely, I.R.C. sec. 6331 is intended to reach only one party's interest. In such cases, I.R.C. sec. 6331 is an appropriate tool to collect delinquent taxes. *National Bank*, 472 U.S. at 728-31. Here, the IRS levied and sold only Dale's right to the property. Thus, I.R.C. sec. 6331 was the appropriate tool authorized by Congress to seize and sell Dale's rights to the property.

In the case where third parties' interests are inadvertently impaired and the IRS has chosen to proceed under I.R.C. sec. 6331, Congress provided a means to adjudicate those rights pursuant to I.R.C. secs. 6343(b) and 7426. These statutory remedies for third parties contemplate the sale of property before the rights are determined. *See National Bank*, 472 U.S. at 728. Thus, the burden was on Albina to invoke the appropriate statutory procedures to protect whatever interest was affected by the levy and sale.[5]

---

[5] The dissent in *National Bank* interpreted the majority to hold that the only recourse for a third party claiming an interest in property levied upon pursuant to I.R.C. sec. 6331 is through I.R.C. secs. 6343(b) and 7426. One of the reasons the dissent criticized the majority was because the statute of limitations for such actions is only nine months. *See National Bank*, 472 U.S. at 736 (Powell,

Although the Court stated that I.R.C. sec. 6331 is provisional, it is provisional only because third parties' rights are not resolved. The fact that the code section is provisional does not prevent the IRS from doing what the IRS code specifically allows: seizing and selling the property. Neither the Court nor the code requires that an adjudication of third parties' interests occur before the explicit authority to sell the property is invoked.

The practical effect of Albina's argument is to require the IRS to proceed under I.R.C. sec. 7403, which provides for notice to and joinder of all parties whenever third parties have an interest in the levied property. The Court in *National Bank* rejected this argument. *National Bank*, 472 U.S. at 732-33.

Albina's second argument is that, although the constitutionality of I.R.C. sec. 6331 has been repeatedly upheld, it is nevertheless *per se* unconstitutional as applied to the facts of this case. She relies on *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), which holds that because a mortgagee has a legally protected property interest, he or she is therefore entitled, under the due process clause, to personal or mailed notice of a tax sale of

---

J., dissenting).

the property. *Id.* at 798. Albina argues that her equal interest is analogous to a mortgagee's interest, and therefore because the Elfelts never proved she received notice the sale is *per se* unconstitutional.

Albina's constitutional argument must fail. In *Mennonite,* the tax sale altered the lien priorities and drastically diminished the value of the mortgagee's security interest. *Id.* The tax sale had the potential to nullify the mortgagee's interest. *Id.* Here, Albina does not have a lien on Dale's interest and her equal interest was not sold or diminished in value. She has the same interest after the sale that she did before the sale. Furthermore, in an I.R.C. sec. 7403 action in which a homestead was levied and sold, the Supreme Court stated that "if sec. 7403 allowed for the gratuitous confiscation of one person's property interests in order to satisfy another person's tax indebtedness, such a provision might pose significant difficulties under the Due Process Clause of the Fifth Amendment." *United States v. Rodgers,* 461 U.S. 677, 697 (1983). Here only Dale's interest was sold. Albina's interest was not confiscated to satisfy Dale's indebtedness. Thus, the IRS actions are not *per se* unconstitutional.

Albina's final argument is that a homestead is indivisible because the homestead cannot be conveyed

without the consent of the other party. Thus, Albina reasons that I.R.C. sec. 6335(c) mandates that the entire indivisible property be sold.[6]

A homestead can be divided. *See* sec. 706.02(1)(f), Stats. However, state law requires that a conveyance alienating any interest a married person may have in a homestead must be signed by both parties. *Id.* This limitation is a state law consequence of a property interest and it becomes inoperative to prevent an administrative levy. *See National Bank*, 472 U.S. at 722.

Thus, the IRS's actions are authorized by federal law. Because the jury found that the IRS complied with the statutory requirements of the seizure and sale, and

---

[6] I.R.C. sec. 6335(c) states:

> Sale of Indivisible Property.–If any property liable to levy is not divisible, so as to enable the secretary by sale or part thereof to raise the whole amount of the (continued)
> tax and expenses, the whole of such property shall be sold.

Wisconsin has an identical provision. *See* sec. 71.91(6)(f)3, Stats.

this finding is not challenged on appeal, the Elfelts acquired title to one-half interest in the property. Once an interest in a joint tenancy is conveyed, the interest becomes a tenancy in common. *Nichols,* 43 Wis.2d at 349, 168 N.W.2d at 878. Tenants in common can sue for partition and rent. *See* sec. 700.23(3)(a), Stats.

The second issue is whether Albina's appeal is frivolous under Rule 809.25(3)(c), Stats. There are no cases directly on point. The special status that homesteads and joint tenancies receive by law support a good faith argument that homesteads and joint tenancies are to be treated differently under the federal tax law. We are unable to conclude that the legal issues in this appeal lacked any reasonable basis in law and equity or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. Thus, the appeal was not frivolous. *See* Rule 809.25(3).

In summary, in Albina's appeal, we affirm that portion of the judgment which ordered a partition of the property. We also affirm the finding that the Elfelts were entitled to rent from Albina. Finally, we conclude that Albina's appeal was not frivolous.

CROSS-APPEAL[7]

The first issue is whether the Elfelts are entitled to attorney's fees under sec. 804.12, Stats., incurred in proving facts Albina failed to admit. Section 804.12(3), provides that if a party fails to admit the truth of any matter under sec. 804.11, Stats., and if the other party proves the truth of the matter, the requesting party may receive reasonable expenses incurred in making the proof, including reasonable attorney's fees. The only exception relevant to this case is the one for a party failing to admit who had reasonable grounds to believe that he or she might prevail. Section 804.12(3).

The imposition of sanctions pursuant to sec. 804.12, Stats., is discretionary with the trial court. *See In re Estate of Glass,* 85 Wis.2d 126, 146-47, 270 N.W.2d 386, 396

---

[7] The Elfelts argue that the trial court erred in determining the amount of rent Albina owed to the Elfelts. The trial court determined that the rent began accruing from the date of the jury verdict. The Elfelts argue that the amount should begin accruing on the date of the demand for rent. Albina agrees. *See* sec. 700.23(3)(a), Stats. Based upon Albina's confession of error and the statute we reverse the trial court's determination that rent should begin accruing from the date of the jury verdict.

(1978). The trial court summarily denied the Elfelts' request for attorney's fees and did not make any factual findings. The trial court did not address whether there were any reasonable grounds to deny the requests for admission. It is well established that a decision which requires the exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an abuse of discretion as a matter of law. *Schmid v. Olsen,* 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983). However, if the reviewing court can conclude *ab initio* that there are facts of record which would support the trial court's decision had discretion been exercised on those facts, reversal is not automatic. *Id.*

After the Elfelts' motion for summary judgment was denied, the Elfelts requested that Albina admit that the IRS's actions were in "accordance with the laws of the United States." Albina denied the request. The jury subsequently found that the IRS complied with the legal requirements in selling Dale's rights to the property to the Elfelts.

The Elfelts argue that Albina's refusal to admit the facts was unreasonable based on two I.R.C. sections: (1) I.R.C. sec. 6339(b)(1), providing that the deed of the sale is prima facie evidence of the facts stated

therein; and (2) I.R.C. sec. 6340(b), providing that the Record of Seizure and Sale of Real Estate" is prima facie evidence of the facts therein. The seizure and sale of Dale's interest involved a deed and a "Record of Seizure and Sale of Real Estate. These documents state that the assessment against Dale was proper and that the statutory requirements in seizing and selling the interest were followed. The Elfelts argue that Albina's denial was unreasonable because Albina denied those facts despite the prima facie evidence of those documents' truth and because she failed to introduce any evidence disputing the facts stated in those documents.

We cannot conclude *ab initio* that the facts of record support the trial court's denial of attorney's fees and that Albina's denial was reasonable. Both parties argue over who had those documents and why there was a delay in getting them from the IRS. Albina argues that she did not have the proper documents necessary to make the admissions at the time of the request, but received them on the eve of the trial. The Elfelts claim that Albina knew of the quitclaim deed and the "Record of Seizure and Sale of Real Estate." Based on this unresolved record, we cannot conclude whether there were reasonable grounds to deny the requests for admission. Therefore, we remand for the trial court to make the necessary determinations.

The second issue is whether the trial court erred in denying the Elfelts' attorney's fees under sec. 814.025, Stats., on the grounds that Albina's claims and defenses were frivolous.

Section 814.025, Stats., provides that in order to find a proceeding frivolous, the trial court must find that the attorney knew, or should have known, that the action was without any reasonable basis in law and could not be supported by a good faith argument for an extension, modification or reversal of existing law. Whether the attorney knew or should have known that the claim was without reasonable basis in law presents a mixed question of law and fact. *Stoll v. Adrumsen,* 122 Wis.2d 503, 513, 362 N.W.2d 182, 187 (Ct. App. 1984). A determination of what a reasonable attorney would or should have known with regard to the facts requires the trial court to determine what those facts were. *Id.* at 513, 362 N.W.2d at 188. However, the legal significance of those findings presents a question of law. *Id.* We decide questions of law without deference to the trial court. *Id.* at 514, 362 N.W.2d at 188.

If the record is sufficient, we can decide as a matter of law whether a reasonable attorney should have known whether the action was without a proper basis in law. *See Richland County v. DHSS,* 146 Wis.2d 271, 275, 430

N.W.2d 374, 376 (Ct. App. 1988). Here, the record is sufficient for us to determine as a matter of law because Albina argued throughout the proceedings that the IRS was without legal authority to seize and sell Dale's equal interest in a homestead held in joint tenancy. This is a question of law and does not require that the trial court make factual findings.

The Elfelts argue that Albina ignored the plain meaning of I.R.C. secs. 6321 through 6340 which permit the IRS to sell property and interests in property through administrative procedures. However, this is a unique case because the facts involve joint tenancy, homestead and administrative levy and because there are no reported cases directly on this issue. The test is whether the party's position is so indefensible that it is frivolous and whether that party or its attorney should have known it. Stoll, 122 Wis.2d at 517, 362 N.W.2d at 189. There are no cases which explicitly reject Albina's arguments. Although the language of the IRS code is broad, it is defensible that the code did not authorize administrative seizures and sales in situations like the one before us.

In conclusion, the IRS had the legal authority to levy and sell Dale's equal interest in the homestead held in joint tenancy. The Elfelts, therefore, are entitled to rent

and partition. Furthermore, Albina's claims, defenses and appeal were not frivolous due to the unique facts of this case and the lack of precedent. However, we remand to the trial court to determine: (1) Whether Albina had any reasonable grounds to deny the requests for admissions. (2) The amount of rent due from Albina accruing from the date the Elfelts made their written demand for payment of rent.

By the Court.–Judgment affirmed in part, reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT
WAUKESHA COUNTY

JAMES M. ELFELT, JOSEPH P. ELFELT, ANTHONY J. ELFELT, LAWRENCE W. ELFELT, PAUL G. ELFELT, DAVID C. ELFELT, and STEPHEN M. ELFELT,
Plaintiffs, Case No. 88-CV-0960

vs.

DALE T. COOPER and ALBINA COOPER,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above entitled matter having come on for a trial on April 17, 18 and 19, 1990, and having been tried before the Court, the Honorable Clair Voss, Circuit Judge presiding, and an advisory jury, and the advisory jury having rendered their verdict which is of record, wherein they find that the Internal Revenue Service complied with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in the real property located at 38050 Dolmar Park Road, Dousman, Wisconsin; and

Said matter having come on for a hearing on May 14, 1990, on the parties' motions after verdict; and

NOW, THEREFORE, upon all the records, minutes, and proceedings herein before held, I, the judge, do find and decide as follows:

FINDINGS OF FACT

1. That all the allegations of the plaintiffs' amended complaint are proven to be true.

2. That on June 25, 1986, the Internal Revenue Service sold to John Elfelt and Stacey Elfelt all right, title and interest of Dale T. Cooper and into the following described premises situated in Waukesha, Wisconsin:

> Lot 18, in Dolmar Park, a subdivision of part of the Northeast 1/4 of the Southeast 1/4 of Section 17, and the Northeast 1/4 and Southwest 1/4 of the Southwest 1/4 of Section 16, Town 6 North, Range 17 East, in the Town of Ottawa, Waukesha County, Wisconsin.

3. On January (sic) 25, 1986, Dale T. Cooper owned an undivided one-half (1/2) interest in joint tenancy with Albina Cooper in said property.

4. That the Internal Revenue Service complied with the legal requirements in selling to John and Stacey Elfelt all of Dale T. Cooper's interest in said property.

5. That Dale T. Cooper died on April 1, 1989.

6. That following expiration of the period allowed by law for redemption from said sale, on January 5, 1987, the Internal Revenue Service issued to John Elfelt and Stacey Elfelt a District Director's Quit Claim Deed conveying to them the interest of Dale T. Cooper in and to the above described premises, which Deed was recorded in the Office of the Waukesha County Register of Deeds on April 17, 1987 as Document Number 1417137.

7. That on January 31, 1987, John Elfelt and Stacey Elfelt, husband and wife, deeded their interest in the above described property to the plaintiffs, which Deed was recorded in the Office of the Waukesha County Register of Deeds on April 17, 1987 as Document Number 1417138.

8. That a partition of the premises cannot be made without prejudice to the owners of said property.

9. That defendant, Albina Cooper, has occupied said property continuously from January 1, 1987 to the date of trial to the exclusion of the defendants.

10. That from January 1, 1987 to the date of trial, said property has had a reasonable rental value of $625.00 per month.

11. That on January 1, 1987, plaintiffs made written demand upon defendant for a proportionate share of the reasonable rental value of said property, but defendant has not paid any rent to plaintiffs.

CONCLUSIONS OF LAW AND JUDGMENT

It is by the Court determined and adjudged as follows:

1. That the plaintiffs, James M. Elfelt, Joseph P. Elfelt, Anthony J. Elfelt, Lawrence W. Elfelt, Paul G. Elfelt, David C. Elfelt, and Stephen M. Elfelt, are the owners in fee simple of an undivided one-half (1/2) interest in the above described property.

2. That the defendant, Albina Cooper, is the owner in fee simple of an undivided one-half (1/2) interest in the above described property.

3. That all, and singular, the property above described shall be sold at public auction, in the County of Waukesha, by and under the direction of the

Sheriff of Waukesha County; that the Sheriff give notice of the time and place of the sale in the same manner as is required by law for sales of real estate upon execution; that the Sheriff, after said sale, shall deposit with the Clerk of this Court the proceeds of said sale and shall promptly report the sale to the Court, with a description of the land sold to the purchaser, the name of such purchaser and the price bid by him; that the Clerk shall hold the proceeds of sale until the sale is confirmed by the Court and shall be distributed by the Clerk in accordance with the Court's order of confirmation.

4. That any of the parties may become purchasers at the sale.

5. That after the confirmation of the sale of said property, the purchaser or purchasers at such sale, his or their heirs and assigns, shall be vested with all of the estate, title and interest of all the parties to this action and those claiming under them shall be let into possession of the property on production of the said Sheriff's Deed or a duly authenticated copy thereof, and that each and every of the parties to this action who may be in possession of the property described in such Deed and every other person who since the filing of such notice of the pendency of this action has come into possession of the same, or any part

thereof, under them or either or any of them, shall deliver to such grantee or grantees named in such Deed, his or their heirs or assigns, possession of such property as shall be described in such Deed or an authenticated copy thereof, and that a Writ of Assistance issue, if necessary, to secure possession.

6. That the defendant and all persons claiming under her, be hereby enjoined by committing waste upon said property, and from doing any other act that may impair the value of the property at any time between the date of this judgment and the date of such sale.

7. That the plaintiffs' costs of this action, in the sum of $912.25, plus any additional items of costs incurred by the plaintiffs to the date of sale as shall be approved by the court, are allowed by the Court and shall be deducted from the defendant's share of the proceeds of the sale and paid to plaintiffs' attorneys.

8. That the sum of $312.50 per month from April 19, 1990 to the date of sale shall be deducted from the defendant's portion of the sale proceeds and shall be paid to the plaintiffs as rent.

9. That if the defendant's share of the proceeds of said sale be insufficient to pay the amounts

aforesaid, judgment for such deficiency is hereby ordered to be separately rendered against defendant, Albina Cooper.

10. That the defendant's motion for judgment notwithstanding the verdict be and the same hereby is denied.

The Clerk of this Court will enter this judgment.

Dated this 23rd day of May, 1990.

BY THE COURT:

/s/ Clair Voss
Clair Voss
Circuit Court Judge

Judgment entered this 24th day of May, 1990.

/s/ Cynthia S. Ernst
Cynthia Ernst
Clerk of Courts

By: /s/ Delores Sheehan
Deputy Clerk

26 U.S.C. § 6321. Lien for taxes.

If an person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6331. Levy and distraint

(a) Authority of Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) **Seizure and sale of property.**

The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property (whether real or personal, tangible or intangible).

(c) **Successive seizures.**

Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) **Requirement of notice before levy**

(1) **In general,** Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) **10-day requirement.** The notice required under paragraph (1) shall be–

(A) given in person.

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last know address, no

less than 10 days before the day of levy.

(3) **Jeopardy.** Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(e) **Continuing levy on salary and wages.**

(1) **Effect of levy.** The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time.

(2) **Release and notice of release.** With respect to a levy described in paragraph (1), the Secretary shall promptly release the levy when the liability out of which such levy arose is satisfied or becomes unenforceable by reason of lapse of time, and shall promptly notify the person upon whom such levy was made that such levy has ben released."

(f) **Cross references.**

(1) For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

26 U.S.C. § 6334. Property exempt from levy.

(a) **Enumeration.**

There shall be exempt from levy–

(1) **wearing apparel and school books.** Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family.

(2) **Fuel, provisions, furniture, and personal effects.** If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock and poultry of the taxpayer, as does not exceed $1,500 in value;

(3) **Books and tools of a trade, business, or profession.** So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $1,000 in value;

(4) **Unemployment benefits.** Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependent) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or the Commonwealth of Puerto Rico;

(5) **Undelivered mail.** Mail, addressed to any person, which has not been delivered to the addressee.

(6) **Certain annuity and pension payments.** Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and

Coast Guard Medal of Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's compensation. Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Judgments for support of minor children. If the taxpayer is required by judgment of a court competent of jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) Minimum exemption for wages, salary, and other income. Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any periods, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

(10) Certain service-connected disability payments. Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code) disability benefit under–

(A) subchapter II, IV, or VI or chapter 11 of such title 38,

(B) subchapter I, II, or III of chapter 19 of such title 38 or

(C) chapter 21, 31, 32, 34, 35, 37, or 39 of such title 38.

(c) No other property exempt.

Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

26 U.S.C. § 6335. Sale of seized property.

(a) Notice of seizure.

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.

The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the country wherein such

seizure is made, or, if there be no newspaper published or generally circulated in such country, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a) public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) Sale of indivisible property.

If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Manner and conditions of sale.

(1) In General.

(A) Determinations relating to minimum price. Before the sale of property seized by levy, the Secretary shall determine–

(i) a minimum price for which such property shall be sold (taking into account the expense of making the levy and conducting the sale, and

(ii) whether, on the basis of criteria prescribed by the Secretary, the purchase of such property by the United States at such minimum price would be in the best interest of the United States.

(B) Sale to highest bidder at or above minimum price. If, at the sale, one or more persons offer to purchase such property for not less than the

amount of the minimum price, the property shall be declared sold to the highest bidder.

(C) Property deemed sold to United States at minimum price in certain cases. If no person offers the amount of the minimum price for such property at the sale and the Secretary has determined that the purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States at such minimum price.

(D) Release to owner in other cases. If, at the sale, the property is not declared sold under subparagraph (B) or (C), the property shall be released to the owner thereof and the expense of the levy and sale shall be added to the amount of tax for the collection of which the levy was made. Any property released under this subparagraph shall remain subject to any lien imposed by subchapter C.

(2) Additional rules applicable to sale. The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternative applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than–

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the

aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) **Payment of amount bid.** If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary, The sale may be declared by

the Secretary to be null and void for failure to make full payment of the purchase price and the property, may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall received such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(f) Stay of sale of seized property pending Tax Court decision.

For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

26 U.S.C. § 6337. Redemption of property.

(a) Before sale.

Any person whose property has ben levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) Redemption of real estate after sale.

(1) Period. The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of

such property, at any time within 180 days after the sale thereof.

(2) **Price.** Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the country in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) Record.

When any lands sold are redeemed as provided in this section, the Secretary shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

26 U.S.C. § 6338. Certificate of sale; deed of real property.

(a) Certificate of sale.

In case of property sold as provided in section 6335, the Secretary shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) Deed to real property.

In the case of any real property sold as provided in section 6335, and not redeemed in the manner and within the time provided in section 6337, the Secretary shall

execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

(c) **Real property purchased by United States.**

If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary shall at the proper time execute a deed therefor, and without delay cause such deed to be duly recorded in the proper registry of deeds.

26 U.S.C. § 6339. **Legal effect of certificate of sale of personal property and deed of real property.**

(a) **Certificate of sale of property other than real property.**

In all cases of sale pursuant to section 6335 of property (other than real property), the certificate of such sale–

(1) **As evidence.** Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and

(2) **As conveyances.** Shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold; and

(3) **As authority for transfer of corporate stock.** If such property consists of stocks, shall be notice, when received, to any corporation, company, or

association of such transfer, and shall be authority to such corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and

(4) As receipts. If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of such securities or other evidences of debt; and

(5) As authority for transfer of title to motor vehicle. If such property consists of a motor vehicle, shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on his books and records in the same manner as if the certificates of tile to such motor vehicle were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(b) **Deed of real property.**

In the case of the sale of real property pursuant to section 6335–

(1) Deed as evidence. The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title. If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the

party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

(c) Effect of junior encumbrances.

A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority.

(d) Cross references.

(1) For distribution of surplus proceeds, see section 6342(b)

(2) For judicial procedure with respect to surplus proceeds, see section 7426(a)(2)

26 U.S.C. § 6343. Authority to release levy and return property.

(b) Return of property.

If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return–

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of

9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

26 U.S.C. § 7402. Jurisdiction of district courts.

(a) To issue orders, processes, and judgments.

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs, and orders of injunction, and of the *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For damages to United States officers or employees.

Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefore, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

(e) To quiet title.

The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General jurisdiction.

For general jurisdictions of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

26 U.S.C. § 7403. Action to enforce lien or to subject property to payment of tax.

(a) Filing.

In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or

liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) Parties.

All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree.

The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and , in all cases where a claim or interest of the United State therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interest of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, no exceeding the amount of such lien with expenses of sale, as the Secretary directs.

(d) Receivership.

In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

26 U.S.C. § 7426. Civil actions by persons other than taxpayers.

(a) Actions permitted.

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(2) Surplus proceeds. If property has been sold pursuant to a levy, any person (other tan the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale amy bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds. If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in district court of the United States.

(b) Adjudication.

The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) **Injunction.** If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit the enforcement of such levy or to prohibit such sale.

(2) **Recovery of Property.** If the court determines that such property has been wrongfully levied upon, the court may–

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) if such property was sold, grant a judgment for an amount not exceeding the greater of–

(i) the amount received by the United States from the sale of such property, or

(ii) The fair market value of such property immediately before the levy.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) **Surplus proceeds.** If the court determines that the interest or lien of any party to an action

under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any pat of the amount of the surplus proceeds of such sale.

(4) Substituted sale proceeds. If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(c) Validity of assessment.

For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

(d) Limitation on rights of action.

No action may be maintained against any officer o employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States.

(e) Substitution of United States as party.

If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as

a party for such officer or employee as of the time such action was commenced upon proper service of process on

(f) Provision inapplicable.

The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) Interest.

Interest shall be allowed at the overpayment rate established under section 6621–

(1) in the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary or his delegate receives the money wrongfully levied upon to the date of payment of such judgment; and

(2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment.

(h) Cross reference.

For a period of limitation, see section 6532(c).

Wis. Stat. § 842.02 Partition; plaintiffs.

(1) A person having an interest in real property jointly or in common with others may sue for judgment partitioning such interest unless an action for partition is prohibited elsewhere in the statutes or by agreement between the parties for a period not to exceed 30 years.

(2) The plaintiff in his complaint may demand judgment of partition and, in the alternative, if partition is impossible, judicial sale of the land or interest, and division of the proceeds.

Wis. Stat. § 842.14 Judgment of partition. (1) If the court has determined that partition is proper under s. 842.07 or on adoption by the court of a report recommending partition without sale, the court may order or render judgment of partition which shall be conclusive on all the parties to the action and their legal representatives and on all persons claiming or to claim from such parties or persons or any of them, subsequent to the filing of the notice of the pendency of the action.

Wis. Stat. § 842.17 Interlocutory judgment of sale. (1) If the court finds that the land or any portion thereof is so situated that partition cannot be made without prejudice to the owners, and there are no tenants or lienholders, it may order the sheriff to sell the premises so situated at public auction.